FILED
DEC 2002

No. 02-527

In the Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

JOE ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the President's decision not to require or forbid project labor agreements on federal and federally funded construction contracts is preempted by the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 295 F.3d 28. The opinion of the district court (Pet. App. 15a-73a) is reported at 172 F. Supp. 2d 138.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2002. The petition for a writ of certiorari was filed on October 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a challenge to the validity of an Executive Order of the President concerning the use of project labor agreements on federal and federally funded construction projects.

A project labor agreement (PLA) is a pre-hire collective bargaining agreement that is negotiated between a contractor on a construction project and one or more unions. See *Building & Constr. Trades Council* v. *Associated Builders & Contractors* (*Boston Harbor*), 507 U.S. 218, 221-222 (1993). A PLA may establish the terms of employment for persons who will work on the construction project, but who have not yet been hired or voted on union representation. Typically, a PLA provides that the signatory union will represent all workers on the project and that all subcontractors will adhere to the PLA. See Pet. App. 2a; United States General Accounting Office, *Report to Congressional Requesters: Project Labor Agreements—The Extent of Their Use and Related Information* 1, 4 (May 1998) (C.A. App. 255, 258).

Section 8(e) the National Labor Relations Act (NLRA), 29 U.S.C. 158(e), generally bars secondary agreements between unions and employers (*i.e.*, agreements "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person"). Section 8(e) contains an exception, however, for agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." 29 U.S.C. 158(e). Section 8(f) of the

NLRA, 29 U.S.C. 158(f), further provides that "[i]t shall not be an unfair labor practice * * * for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members," where, among other things, "such agreement requires as a condition of employment, membership in such labor organization."

2. In February 2001, the President issued Executive Order 13,202, titled Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, 66 Fed. Reg. 11,225 (2001) (Executive Order) (Pet. App. 74a-77a). The Executive Order directs federal agencies to ensure that bid specifications for federal construction contracts neither require contractors to enter into PLAs with labor organizations nor prohibit contractors from doing so. See *ibid.* (§ 1) (Pet. App. 74a-75a). The Executive Order also directs federal agencies to ensure that the bid specifications for federally funded construction contracts neither require nor prohibit PLAs. See *ibid.* (§ 3) (Pet. App. 75a).

The Executive Order specifically provides that contractors and subcontractors on federal and federally funded construction projects are not prevented from voluntarily entering into PLAs with labor organizations. 66 Fed. Reg. at 11,225 (§ 1(c)) (Pet. App. 75a). It simply prevents federal agencies, federal fund recipients, and construction managers acting on their behalf from requiring contractors to enter into PLAs or prohibiting them from doing so. As the court of appeals explained, "[t]he result in practice is to leave to the

contractors working on a project the choice whether to enter into, and to require their subcontractors to enter into, a PLA, presumably depending upon whether it is likely to increase or to decrease their costs." Pet. App. 3a.

The Executive Order is designed to "promote and insure open competition" on federal and federally funded construction projects, and thereby to "reduce construction costs to the Federal Government and to the taxpayers." 66 Fed. Reg. at 11,225 (preamble) (Pet. App. 74a). It was promulgated pursuant to the President's general supervisory authority under Article II of the Constitution and his statutory authority over government procurement and supply, see Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. 471 *et seq.* See 66 Fed. Reg. at 11,225 (preamble) (Pet. App. 74a). And it applies only "[t]o the extent permitted by law." *Ibid.* (§§ 1, 3) (Pet. App. 74a, 75a).

3. Petitioners, two labor organizations and a municipality, brought suit in the United States District Court for the District of Columbia to enjoin the enforcement of the Executive Order, contending that it prevented them from negotiating PLAs on federal and federally funded construction projects. Petitioner Building and Construction Trades Council specifically challenged the application of the Executive Order to the Woodrow Wilson Bridge construction project, a joint undertaking by Maryland, Virginia, and the District of Columbia financed by a $1.5 billion appropriation by Congress.

Before the issuance of the Executive Order, Maryland had agreed to require a PLA as a bid specification for the foundation portion of the Wilson Bridge project. Because the project was federally funded, Maryland's bid specifications were subject to review by the Federal

Highway Administration, which rejected the PLA requirement as inconsistent with the Executive Order. Subsequently, when Maryland sought bids on the superstructure portion of the project, petitioners sought a preliminary injunction to prevent the Federal Highway Administration from again rejecting a bid specification requiring a PLA.

The district court issued a preliminary injunction barring the application of the Executive Order to the Wilson Bridge project, and subsequently entered a permanent injunction barring the enforcement of the Executive Order generally. Pet. App. 22a, 72a.[1] The court held that the President lacked statutory or constitutional authority to promulgate Section 3 of the Executive Order, which directs federal agencies to ensure, "[t]o the extent permitted by law," that recipients of federal funds do not require or prohibit PLAs on federally funded construction projects. *Id.* at 46a-54a.[2] The court further held that Section 1 of the Executive Order, which directs federal agencies not to require or prohibit PLAs on federal construction projects, as well as Section 3 are preempted by the NLRA, on the ground that they alter the "delicate balance of bargaining and economic power" established by Section 8 of the NLRA, 29 U.S.C. 158. Pet. App. 66a (quoting *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1337, on reh'g, 83 F.3d 439 (D.C. Cir. 1996)).

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[1] After the district court issued the preliminary injunction, the Federal Highway Administration, for reasons unrelated to the Executive Order, denied Maryland's request to include a PLA in the bid specifications for the superstructure contract. That decision has not been challenged.

[2] The district court assumed that the President had the statutory and constitutional authority to issue the remaining portions of the Executive Order.

4. The United States Court of Appeals for the District of Columbia Circuit reversed and vacated the injunction. Pet. App. 1a-14a. The court of appeals held, contrary to the district court, that Article II of the Constitution provided the President with the authority to issue Section 3 of the Executive Order. The court of appeals also held that the Executive Order is not preempted by the NLRA, because the President took proprietary, not regulatory, action in establishing guidelines for the use of PLAs on federal and federally funded construction projects.

First, the court of appeals recognized that the President's authority under Article II to execute the laws "necessarily encompasses 'general administrative control'" of his subordinates. Pet. App. 6a-7a (quoting *Myers* v. *United States*, 272 U.S. 52, 164 (1926)). The court reasoned that Section 3 of the Executive Order is within the President's general supervisory authority under Article II, because it directs federal agencies "how to proceed in administering federally funded projects, but only '[t]o the extent permitted by law.'" Pet. App. 7a (quoting Executive Order).

Second, the court of appeals held that the Executive Order is not preempted by the NLRA, because it "clearly constitutes proprietary action rather than regulation." Pet. App. 10a. The court observed that "the principles of NLRA preemption come into play only when the Government is 'regulating within a protected zone,' and not when it is acting as a proprietor, 'interact[ing] with private participants in the marketplace.'" *Ibid.* (quoting *Boston Harbor*, 507 U.S. at 227).[3]

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[3] The court of appeals acknowledged the government's contention that NLRA preemption principles "developed to govern federal-state relations are ill-suited to cases such as this, which in-

The court of appeals recognized that the decision whether to use a PLA on a construction project is one that private employers are free to make under the NLRA. Pet. App. 11a. The court also recognized that, under this Court's decision in *Boston Harbor*, the same decision is proprietary when made by a state or local government with respect to its construction projects, and thus is not subject to NLRA preemption. *Ibid.* The court held that such decisions are likewise proprietary when made by the President with respect to the federal government's own construction projects. *Ibid.*

The court of appeals held that the President's decision that, to the extent permitted by law, federal fund recipients may neither require nor prohibit PLAs on federally funded construction projects is also proprietary. Pet. App. 11a. The court explained that "the [federal] Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." *Ibid.*

The court of appeals rejected petitioners' argument that the President's decision whether to require or prohibit PLAs on federal and federally funded construction projects, although proprietary if made on a project-by-project basis, becomes regulatory if made through "blanket, across-the-board rules." Pet. App. 12a-13a. The court explained that "there simply is no logical justification for holding that if an executive order establishes a consistent practice regarding the

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volve relations between two branches of the federal government." Pet. App. 10a n.*. The court declined, however, to rule on the "merit of that argument," observing that its decision in a previous case, *Chamber of Commerce*, had found a federal executive order to be preempted under the NLRA. *Ibid.*

use of PLAs, it is regulatory even though the only decisions governed by the executive order are those that the federal government makes as a market participant." *Id.* at 12a (quotation and alteration marks omitted). Here, the court concluded, "[b]ecause the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as 'regulatory.'" *Id.* at 13a.

ARGUMENT

Petitioners do not dispute that the President's decision neither to require nor to prohibit a PLA on a single federal (or federally funded) construction project is proprietary, and thus does not implicate principles of NLRA preemption. Petitioners contend, however, that the same decision, when announced by the President in an Executive Order applicable to all such projects, is transformed into a regulatory one. The court of appeals' contrary holding, based on a straightforward application of this Court's decision in *Boston Harbor*, is correct and does not conflict with the decision of any other court of appeals.

The second question presented by petitioners—whether the Executive Order, if regulatory, would be preempted by the NLRA—is entirely dependent on the first. This Court, like the court of appeals, would have no need to reach that question, because the Executive Order is proprietary, not regulatory, in character. In any event, the Executive Order, even if viewed as an exercise of the President's regulatory authority, would not be subject to preemption under the NLRA. Accordingly, neither question presented by petitioners warrants this Court's review.

1. Petitioners challenge the court of appeals' holding that the President's decision whether to require PLAs on federal and federally funded construction projects remains proprietary, whether the President makes that decision on a case-by-case basis or, as here, on a comprehensive basis. Petitioners contend that the court of appeals applied a standard for determining whether government action is proprietary that is inconsistent with this Court's decision in *Boston Harbor* and the decisions of three other circuits. Petitioners are mistaken.

a. The NLRA, by its terms, does not apply to the United States government or to the States. See 29 U.S.C. 152(2). This Court has made clear that principles of NLRA preemption, while applicable when a state or local government acts as regulator, are not applicable when a state or local government acts in a proprietary capacity—that is, as a participant in the market for goods or services.

In *Boston Harbor*, the Court held that a state agency's decision to require a PLA on a state construction project was proprietary, and thus not subject to NLRA preemption principles. 507 U.S. at 231-232. The Court emphasized that Congress, in the NLRA, had expressly protected private employers' choice whether to require a PLA on a construction project. *Id.* at 232. "In the absence of any express or implied indication by Congress that a State may not manage its own property where it pursues its purely proprietary interests, and where analogous private conduct would be permitted," the Court refused to "deny[] an option to public owner-developers that is available to private owner-developers." *Id.* at 231-232.

The Court distinguished the proprietary activity in *Boston Harbor* from regulatory activity, which the

Court described as activity designed to compel "employer conduct unrelated to the employer's performance of contractual obligations to the State." 507 U.S. at 228-229. Thus, in *Wisconsin Department of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), the State was held to be engaging in regulatory activity when, as a "means of enforcing the NLRA," *id.* at 287, it debarred employers with a past history of unfair labor practices from state contracting, whether or not those violations had any connection to the contractor's work for the State.

b. The Executive Order in this case is the product of the very type of decision that *Boston Harbor* determined to be proprietary: a government's decision whether to require a PLA on a construction project in which the government itself is a participant. Petitioners do not (and, given *Boston Harbor*, cannot) contest that such a decision would be proprietary, and thus not subject to NLRA preemption analysis, if it applied only to a single construction project, such as the Wilson Bridge project. Petitioners nonetheless contend that the same decision becomes regulatory when the government determines that its interests are best served by neither requiring nor prohibiting PLAs on any federal or federally funded construction projects. In arguing that such a decision is regulatory, petitioners seek to apply principles of NLRA preemption to limit not only the *kinds* of economic decisions that government entities can make in procuring goods and services, but also the *ways* in which governments can make those decisions.

As the court of appeals observed, petitioners offer "no logical justification" for such a sweeping intrusion into government operations and, in particular here, into the decision-making of the President of the United

States. Pet. App. 12a. The President may determine that the government's own economic interests are best served by neither requiring nor prohibiting PLAs on its construction projects, as was done here. Or, the President may decide that the government's economic interests are best served by authorizing federal agencies to require PLAs on "large and significant" government construction projects, a conclusion reached by President Clinton in issuing a prior directive. Presidential Memorandum of June 5, 1997, Use of Labor Agreements for Federal Construction Projects (C.A. App. 250-252). In either case, the President is making a wholly permissible decision regarding the efficient expenditure of government funds—the same sort of decision that a private party that owned or financed a construction project might make with respect to its own funds. The fact that the decision is made generally, as here, rather than on a case-by-case basis, as petitioners prefer, does not alter its proprietary character under *Boston Harbor*.

c. The court of appeals' decision does not, as petitioners assert (Pet. 11-12), "direct[ly] conflict" with the decision of any other court of appeals. No other circuit has even considered the question whether this Executive Order, or any remotely similar Executive Order, is proprietary or regulatory in character, much less resolved that question inconsistently with the D.C. Circuit in this case.

Indeed, three of the four cases cited by petitioners held, as did the D.C. Circuit here, that the government requirement at issue was proprietary, not regulatory. See *Sprint Spectrum L.P.* v. *Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686 (5th Cir. 1999); *Colfax Corp.* v. *Illinois State Toll Highway Auth.*, 79 F.3d 631,

634 (7th Cir. 1996). The requirements in those cases, in contrast to the one here, were confined to a single project or contract. It was thus unnecessary for the courts to decide whether the same requirement, if applied to government projects or contracts more generally, would at some point become regulatory. Accordingly, although the courts noted the narrow scope of the challenged requirements in finding them to be proprietary, the courts would not necessarily have held the requirements to be regulatory had they been applied more broadly.

The remaining decision, *Dillingham Construction N.A., Inc.* v. *County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), involved a state prevailing wage law that required employers on state public works projects to pay prevailing wages to employees in apprenticeship programs that had not received state approval, but permitted such employers to pay lower wages to employees in state-approved programs. The Ninth Circuit held that the law was regulatory, not proprietary. Its analysis did not, however, turn on whether the law was specific or general in scope. The Ninth Circuit reasoned that the law was "not motivated by management concerns" about state construction projects, but instead was designed "to regulate apprenticeship programs." *Id.* at 1038. Here, in contrast, the D.C. Circuit recognized that the Executive Order was designed to further the proprietary purpose of "ensur[ing] the most effective use of [government] funds." Pet. App. 11a. Moreover, while the law in *Dillingham* was perceived as one that had an impact beyond the public works projects on which apprentices were employed, the D.C. Circuit concluded that "the impact of [the] procurement policy [expressed in Executive Order No. 13,202] extends only to work on projects funded by the

government." *Id.* at 13a (bracketed material in original). In any event, the Ninth Circuit sustained the law in *Dillingham*, notwithstanding its regulatory character, on the ground that the law was consistent with the NLRA, see 190 F.3d at 1038-1041, thus reaching the same ultimate outcome as the D.C. Circuit did here.

Furthermore, even if the NLRA preemption doctrines and *Boston Harbor* were understood to impose limitations on the manner in which state or local governments may make proprietary decisions (*i.e.*, that they must act on a project-by-project basis), it does not follow that any such limitations would apply to the President. Another Act of Congress, the Procurement Act, vests the President with the authority to make decisions and establish policies on proprietary matters for the Executive Branch, and Article II of the Constitution vests the President with authority to superintend the officers of the Executive Branch in performing their duties under the various laws, including those governing grants, that they are charged with administering.

In sum, the court of appeals correctly held that the Executive Order, which involves the same sort of decision that *Boston Harbor* recognizes to be proprietary, is the action of the government as a market participant, not as a regulator. That holding is fully consistent with the decisions of this Court and other courts of appeals.

2. Petitioners further contend that the Executive Order, if viewed as a regulatory measure, would be subject to preemption under the NLRA. The court of appeals, having recognized that the Executive Order is proprietary, did not address that question, except to observe in passing that, under circuit precedent, NLRA

preemption principles apply to regulatory acts of the Executive Branch of the National Government, as well as to regulatory acts of a state or a local government. See Pet. App. 10a n.* (citing *Chamber of Commerce*, 74 F.3d at 1335). Accordingly, if this Court were to grant certiorari and reverse on the first question presented in the petition (contrary to the government's argument above), the appropriate course would be to remand the case to the court of appeals to consider whether, or how, NLRA preemption principles apply to the Executive Order. See, *e.g.*, *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489 (2001); *NCAA* v. *Smith*, 525 U.S. 459, 469-470 (1999); *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 n.5 (1998).

Even if the Executive Order were viewed as regulatory, rather than proprietary, it would not follow that the Executive Order is subject to ordinary NLRA preemption analysis, much less that it fails that analysis. To be sure, the D.C. Circuit held in *Chamber of Commerce* that the doctrine of NLRA preemption articulated in *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists*), "applies to federal as well as state action." 74 F.3d at 1334; see *id.* at 1337-1338 (concluding that an Executive Order that denied government contracts to firms that hired permanent replacements for striking workers was invalid under the *Machinists* doctrine). But the conclusion in *Chamber of Commerce* that *Machinists* preemption should be imported into this quite different setting ignores the distinct origins of *Machinists* preemption as a restraint on state and local governments by operation of the Supremacy Clause.

In *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960), the Court explained that, in enacting the NLRA, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Id.* at 488. Applying that precept, the Court concluded that the National Labor Relations Board had impermissibly attempted to regulate tactics that Congress had intended to leave free from regulation. Subsequently, in *Machinists*, the Court held that, in light of the NLRA's implied limitations on the Board's regulatory authority, parallel limitations apply to the States under the Supremacy Clause. See 427 U.S. at 146.

Insurance Agents and the subsequent line of preemption cases thus flow from the implicit limitations on the regulatory authority that the NLRA vests in the National Labor Relations Board. The absence of regulatory authority under the NLRA cannot logically provide a basis for invalidating action of the President that is independently authorized by Article II of the Constitution or by another Act of Congress. It is particularly anomalous to conclude, as the court of appeals did in *Chamber of Commerce*, that action of the President that is authorized by Article II and the Procurement Act is invalid, on the theory that the action involves matters that the NLRA intends to leave unregulated by the National Labor Relations Board and that the Supremacy Clause requires to be unregulated by the States. The NLRA vests regulatory authority in the Board. Article II gives the President general supervisory power over the Executive Branch, and the Procurement Act gives the President proprietary authority over the government's acquisition of property and services. Those distinct grants of author-

ity can and should be read harmoniously. See generally *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534 (1995).

Moreover, the Executive Order does not violate *Machinists* preemption principles. In arguing to the contrary, petitioners assert (Pet. 29) that "whereas the NLRA explicitly authorizes construction managers and construction unions to freely negotiate PLAs, the Executive Order negates that explicit authorization by prohibiting the[ir] negotiation." That argument is inconsistent with the reasoning of *Boston Harbor*. As explained above, the Court recognized in that case that governments, like private actors, may decide to enter into PLAs on their own construction projects. It necessarily follows that governments, like private actors, may decide *not* to enter into PLAs on such projects, and may direct their construction managers not to negotiate such agreements. (Under the Executive Order, contractors and construction unions are free to enter into PLAs, if they independently choose to do so. See Pet. App. 75a.) Nor does the Executive Order involve the regulation of "economic weapons," *Machinists*, 427 U.S. at 141, the protection of which has been the primary focus of the *Machinists* doctrine.[4]

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[4] Petitioners also argue (Pet. 29) that the Executive Order violates the separate preemption doctrine articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959), which applies to state or local regulation of activities that arguably "are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." The Executive Order, in contrast, concerns an activity that is permitted under Section 8, but that is neither protected under Section 7 nor prohibited under Section 8. 29 U.S.C. 157, 158. Moreover, in a large number of its applications (including the Wilson Bridge project), the Executive Order applies to contracts between two government entities, neither of which is

In any event, because the court of appeals correctly held that the Executive Order is proprietary, this case does not provide an appropriate occasion to consider whether, or to what extent, NLRA preemption principles apply to actions of the Executive Branch that cannot be so characterized.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2002

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subject to the NLRA. It would be remarkable to conclude that a contract between two entities, neither of which is subject to the NLRA, could be deemed to contravene the NLRA because one party chooses to employ a private agent to supervise construction.